

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

STEVEN SCHREIBER,	*	Case No. 15-CV-6861 (CBA)
<i>individually and derivatively</i>	*	
<i>on behalf of Two Rivers</i>	*	
<i>Coffee, LLC,</i>	*	
	*	
Plaintiff,	*	Brooklyn, New York
	*	September 19, 2017
v.	*	
	*	
EMIL FRIEDMAN, et al.,	*	
	*	
Defendants.	*	
	*	
* * * * *		

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE JAMES ORENSTEIN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings commenced at 10:35 a.m.)

2 THE CLERK: Civil cause for a status conference,  
3 Schreiber versus Friedman, et al, docket Number 15-CV-68661.

4 Will the parties please state their appearances for  
5 the record starting with the plaintiff.

6 MR. NELKIN: Good morning, Your Honor. Jay Nelkin  
7 and Carol Nelkin for the plaintiff.

8 THE COURT: Good morning. And You've got your  
9 client with you.

10 Good morning.

11 MR. SCHREIBER: Good morning.

12 MR. SCHAFHAUSER: Good morning, Your Honor. Paul  
13 Schafhauser, of Chiesa Shahinian & Giantomasi, for the  
14 pleading defendants.

15 THE COURT: Good morning.

16 MR. SCHAFHAUSER: Good morning.

17 MS. MATTHEWS: Good morning, Your Honor. Marie  
18 Matthews, also from Chiesa Shahinian & Giantomasi.

19 THE COURT: Good morning.

20 MR. GRANTZ: Good morning, Your Honor. David  
21 Grantz, from the law firm of Meyner & Landis, on behalf of the  
22 E&J defendants and the oil and trucking defendants.

23 THE COURT: Good morning.

24 MR. FELDMAN: Good morning, Your Honor. Richard  
25 Feldman, Rosenberg Feldman Smith, on behalf of the Devine

1 defendants.

2 THE COURT: Good morning.

3 MR. RUDERMAN: Good morning, Your Honor. Jeffrey  
4 Ruderman, from Cyruli Shanks Hart & Zizmor, on behalf of the  
5 coffee defendants. I'm new to the table, Your Honor, before  
6 Your Honor taking over for Maurice Heller.

7 THE COURT: All right. Good morning.

8 MR. BERGSON: Good morning, Your Honor. Rob  
9 Bergson, Abrams Garfinkel Margolis Bergs on for Geoffrey  
10 Hersko.

11 THE COURT: Good morning.

12 MS. PASTRIKOS: Good morning, Your Honor. Catherine  
13 Pastrikos, on behalf of the E&J and the oil and trucking  
14 defendants.

15 THE COURT: Good morning.

16 MR. FINKEL: Good morning, Your Honor. Richard A.  
17 Finkel for Sylvia Ezell, for Jorge Salcedo and Sonia Rivera.

18 THE COURT: Good morning.

19 All right, all. We've got a number of things that  
20 have cropped up since I last saw you. I'll try to get to them  
21 in turn.

22 One housekeeping note, in light of the continued  
23 problems that we have over just proliferating and prolix  
24 filings. Three pages in a letter. No more without leave.  
25 12-point type. I hate to get into this level of detail, but

1       you folks are abusing your rights. So we need to do this.  
2       Three pages, 12-point type, one-inch margins. Don't cheat.  
3       Okay? Don't try and sneak in extra just to --

4               And on the defense side, I don't need eight, nine,  
5       ten letters for the same point. You all agree with each  
6       other, just say in the one letter you all agree. Don't file  
7       multiple letters unless you've been leave to, unless you are  
8       trying to request different relief.

9               And please don't look for ways around that or I'll  
10       find more ways to constrain. Okay? But the number of  
11       submissions is out of control.

12               Second, I'm aware of my individual practice  
13       requirements. I'll monitor them. I don't think it's terribly  
14       useful for there to be back and forth about that.

15               If I think something shouldn't be heard on the  
16       merits because of non-compliance with my procedural  
17       requirements, I'll let you know.

18               And just as I'm letting you know now when I think  
19       you're abusing the rights that you have and they need to be  
20       brought under more predictable control, I'll let you know.

21               But, again, it's a waste of all of your efforts and  
22       time to be fighting over whether something complies with my  
23       procedural rules.

24               They are there for -- to provide predictability to  
25       the parties as a matter of convenience, but they don't create

1 any rights for anybody.

2 All right. So it strikes me we've got a couple of  
3 basic things to attend to. I don't anticipate we're going to  
4 resolve any substantive matters today as much as map out a  
5 procedural path forward.

6 We've got the completion of the sanctions motion for  
7 violation of the preliminary injunction. And then more  
8 recently we've got requests from the plaintiffs, from the  
9 plaintiff for attachment to bond receiver and various other  
10 forms of relief.

11 So let's -- before we jump into it -- and I'll hear  
12 from you about what you think is an appropriate procedural  
13 path forward -- let me suggest this.

14 I think a lot of what has been requested in the  
15 recent requests, they are misplaced in a sense that they were  
16 directed to me. They're requesting largely injunctive relief  
17 that I'm not authorized to order.

18 However, I don't think it's a waste to put the  
19 parties on notice of it, as I'm confident that virtually all  
20 of these issues will be referred to me in one form or another  
21 for ordering that which I'm empowered to order, and  
22 recommending relief where I'm not. So I don't think it's  
23 misdirected.

24 I do think, however, that it's a nature that  
25 shouldn't just be tucked into another-wise unsolicited status

1 report.

2 I'm going to treat today's conference as a pre-  
3 motion conference on those matters and we'll chart an orderly  
4 path forward.

5 A lot of what's in that status report may or may not  
6 warrant the relief that's requested, but some significant  
7 chunk of it, I think, and some of it is even characterized  
8 this way is, if true, a violation of -- leaving aside any  
9 other rights -- of matters covered by the preliminary  
10 injunction.

11 So I think some of this can properly be folded into  
12 completion of the hearing on the motion for sanctions on the  
13 preliminary injunction.

14 The last piece before I turn over the floor to all  
15 of you, I was more than a little disappointed for a number of  
16 reasons to see the allegation recently that there are a number  
17 of computers and other devices that haven't been turned over  
18 pursuant to my order of October, 2016. It clearly should have  
19 been done.

20 I want to hear from the other side their response as  
21 to what, if anything, hasn't been turned over. But also if  
22 true, it should have been brought to my attention and Judge  
23 Amon's long before. Because the benefit of having it, having  
24 these devices imaged while you went forward with litigation  
25 before Judge Amon is largely lost if there's a delay. We'll

1 have to consider other potential remedies.

2 So let's perhaps start there. And from all -- let  
3 me just go around the table.

4 I'm not accepting anybody's assertions on either  
5 side at face value necessarily, but I just want to know what  
6 those assertions are.

7 So if we could just go around the table. If each  
8 defendant's counsel could state whether in your view every  
9 computer, information processing device, you know what I'm  
10 talking about, has been turned over for imaging or not.

11 Mr. Schafhauser?

12 MR. SCHAFHAUSER: There is a computer device which  
13 we have raised with Mr. Nelkin. It's a computer device that  
14 has been in actually West Palm Beach, Florida.

15 I actually sent Mr. Nelkin correspondence about this  
16 on November 16th of last year. And I advised Mr. Nelkin that  
17 computer would be made available for imaging in West Palm.  
18 That correspondence was then put on the docket. I actually  
19 reported the same thing --

20 THE COURT: Has it been turned over yet or not?

21 MR. SCHAFHAUSER: It remains available --

22 THE COURT: So the answer is no?

23 MR. SCHAFHAUSER: The answer is it remains --

24 THE COURT: By Friday, please.

25 MR. SCHAFHAUSER: Yes, Your Honor.

1 THE COURT: Mr. Grantz.

2 MR. GRANTZ: Your Honor, I have a couple of  
3 different issues. One is --

4 THE COURT: Let's start with --

5 MR. GRANTZ: Yeah.

6 THE COURT: The first issue is answering the  
7 question.

8 MR. GRANTZ: Yes. I'm going to -- that's what I'm  
9 talking about.

10 So Jack Ahern's wife has a computer. I never  
11 thought that for a second that her computer was in his  
12 possession, custody or control, or that it was available to  
13 him, but we requested it and the wife wouldn't give it. So  
14 I've since again requested it -- this is back in November --  
15 and he said that he will make it available for imaging at his  
16 house which is the procedure that took place last year.

17 THE COURT: By Friday, please.

18 MR. GRANTZ: That's fine, Your Honor. That's one of  
19 the issues.

20 There's a second issue. The companies -- one of the  
21 companies pays for phones for many, many people. Some of  
22 those phones have clearly been produced already. Some of the  
23 phones have numbers that don't actively have any usage.

24 So if you look at the bill, it has no data or phone  
25 calls on it so it's not actually being used by anyone. And

1       then other phones are belonging to children and family  
2       members, but they're paid at least initially as a pass through  
3       by one of the companies --

4               THE COURT: Are you objecting to the contents of the  
5       order?

6               MR. GRANTZ: No, I'm not objecting to that.

7               THE COURT: Have you complied with it? Have you  
8       turned them over?

9               MR. GRANTZ: The phones have not been turned over,  
10      Your Honor.

11              THE COURT: Do it -- do it by Friday, please.

12              MR. GRANTZ: They're not available because they're  
13      not in the company's possession, custody and control. It's,  
14      you know, there's children in --

15              THE COURT: All right. I'll consider the  
16      appropriate contempt sanction.

17              What next?

18              MR. GRANTZ: That's the only things that I have,  
19      Your Honor.

20              THE COURT: All right. Explain to your clients that  
21      the next step is contempt sanctions.

22              MR. GRANTZ: I will explain it.

23              THE COURT: See how they respond.

24              MR. GRANTZ: I will put something in writing to Your  
25      Honor to detail exactly what we've done in connection with

1       these phones to provide Your Honor with the understanding of  
2       who has the phones and why they're not in our possession,  
3       custody and control. And if the --

4               THE COURT: He's paying for them?

5               MR. GRANTZ: The company pays for them as a pass  
6       through.

7               THE COURT: The company is paying for them? Turn  
8       them over or cut off the payments.

9               MR. GRANTZ: As I understand it, the company pays  
10      for them and then they're reimbursed.

11              THE COURT: I don't care. Look, you understand that  
12      this is covered by the order. Your clients understand this.  
13      They can turn them over or they can be in contempt. Those are  
14      the options. By Friday.

15              MR. GRANTZ: Thank you, Your Honor.

16              THE COURT: Next? Mr. Feldman?

17              MR. FELDMAN: The Devine defendants were excluded  
18      from producing.

19              THE COURT: All right. Mr. Ruderman?

20              MR. RUDERMAN: I'm not aware of any computers that  
21      have not been turned over pursuant to the court order, Your  
22      Honor.

23              THE COURT: Have you done a full review with your  
24      clients?

25              MR. RUDERMAN: I've asked my clients about the

1 computers that he's had. He said he's produced all the  
2 computers that they use in connection with the operations of  
3 the coffee entities.

4 THE COURT: Not with the operations. I didn't put  
5 that limitation on it.

6 MR. RUDERMAN: Plus the individual computers and  
7 phones, et cetera and so forth, the laptops, et cetera.

8 THE COURT: You've reviewed the order, yes? It's an  
9 extensive one.

10 MR. RUDERMAN: Yes, Your Honor. And I'm not aware  
11 of any computer that is --

12 THE COURT: I'm not asking if you are aware of  
13 something that hasn't been turned over. I'm asking if you  
14 have made sure that everything has been turned over. There's  
15 a difference. And there's an obligation on counsel to make  
16 sure they have discussed this with their clients. Have you  
17 done that?

18 MR. RUDERMAN: I've discussed it with my clients  
19 whether he has produced or they have produced all devices --

20 THE COURT: Have you asked him for an inventory of  
21 all devices in the possession, custody and control?

22 MR. RUDERMAN: Not beyond what was done by Mr.  
23 Heller, Your Honor.

24 THE COURT: Check.

25 MR. RUDERMAN: Yes, Your Honor.

1 THE COURT: Mr. Bergson?

2 MR. BERGSON: The Hersko defendants were excluded  
3 from the order, Your Honor.

4 THE COURT: Ms. Pastrokos?

5 MR. GRANTZ: She's with me.

6 THE COURT: Yeah. With Mr. Grantz.

7 And Mr. Finkel?

8 MR. FINKEL: Yes, Your Honor. I've spoken with my  
9 clients. Everything has been turned over for imaging.

10 THE COURT: Okay. So we've got Mr. Grantz's clients  
11 and Mr. Schafhauser's that will turn over everything that they  
12 acknowledge hasn't yet been turned over by Friday subject --  
13 on pain of contempt.

14 MR. SCHAFHAUSER: Your Honor, I would just request  
15 that you extend that time until Tuesday because of the Jewish  
16 holidays. You spoke --

17 THE COURT: Yes. The Jewish holidays complicate  
18 things for people who haven't complied with their obligations  
19 to the Court. No.

20 MR. GRANTZ: Your Honor.

21 THE COURT: Yes.

22 MR. GRANTZ: I would just request that they be  
23 turned over to Stroz because there won't be anyone on our side  
24 to collect them.

25 THE COURT: Make your arrangements. They were

1 originally going to be sent over to Stroz in any event.

2 MR. SCHAFHAUSER: Actually that's not the way it  
3 happened. Stroz came out to all of the locations --

4 THE COURT: Work it out so that they are turned over  
5 by Friday. You make arrangements to have somebody pick them  
6 up. If you don't, you don't get them.

7 MR. GRANTZ: We'll do our best.

8 THE COURT: All right. Now on the continuation of  
9 the hearing, Mr. Nelkin, on your side, you've collected some  
10 more issues that you want to raise as violations of the  
11 preliminary injunction hearing.

12 MR. NELKIN: Your Honor, I think those were just --  
13 our intention was simply to denote things that had been raised  
14 in our earlier -- with respect --

15 THE COURT: Okay. So is it -- are you -- I just  
16 forget where we left off with the hearing at the time when we  
17 had the problems with what appeared to be spoliation and we  
18 took a pause so that we could explore that. And then we had a  
19 much longer pause for litigation over that order.

20 MR. NELKIN: Right. So the issues with respect to  
21 the usage of the credit card and those matters that were at  
22 sort of the end of the status report, those were raised  
23 before.

24 THE COURT: Okay.

25 MR. NELKIN: And we're simply raising them to say

1       that they hadn't been addressed.

2               THE COURT: Is there anything further? Had you  
3       rested or was there evidence you were going to produce?

4               MR. NELKIN: The way I believe, Your Honor had set  
5       the schedule was, is that the computers were to be imaged --

6               THE COURT: Right. And then they actually did the  
7       report.

8               MR. NELKIN: -- there was privilege review, and then  
9       each expert would be cross-examined, but that there would be  
10      no more evidence that was put on.

11              THE COURT: All right. Have you -- so now that  
12      Judge Amon has issued her ruling, Stroz has the -- is doing  
13      the analysis and is providing it to you?

14              MR. NELKIN: No. We're under order that we don't --  
15      are not to get a copy until they've conducted their privilege  
16      review as I understand it.

17              THE COURT: Oh, okay. So let's have the privilege  
18      review in two weeks, please. And then we'll move on from  
19      there.

20              MR. SCHAFHAUSER: Your Honor.

21              THE COURT: Yeah.

22              MR. SCHAFHAUSER: The timing is -- well, first of  
23      all, there's extensive machines. We had 61 machines that were  
24      copied. There are going to be some more --

25              THE COURT: What do you propose?

1 MR. SCHAFHAUSER: Well, first of all, we've gone  
2 through the machines with our -- with K-2 and K-2 indicated  
3 that 14 of the machines were unreadable. So they contacted  
4 Stroz and asked for additional copies. So there's been two  
5 sets of copies. One that Stroz has --

6 THE COURT: I don't know if you heard the question  
7 the first time. Let me repeat it. What do you propose?

8 MR. SCHAFHAUSER: I think our e-discovery company  
9 needs about six weeks to get the things in a position for us  
10 to go through the images and to complete a review of the  
11 privileged material so that we can advise Stroz what they need  
12 to pull from the images.

13 THE COURT: Have you looked at all in this period  
14 that the case has been pressed?

15 MR. SCHAFHAUSER: Have we personally looked at it?

16 THE COURT: No. Have you -- have you asked them?

17 MR. SCHAFHAUSER: Yes.

18 THE COURT: Because there's nothing stopping you  
19 from knowing what you have and doing some review on your side,  
20 correct?

21 MR. SCHAFHAUSER: What we did was --

22 THE COURT: Is that correct?

23 MR. SCHAFHAUSER: Yes. What we did --

24 THE COURT: Have you done it?

25 MR. SCHAFHAUSER: What we did was, we hired K-2. We

1 spent money with them to take the machines and put them in  
2 readable form because we had images that needed to be  
3 searched. That process was done and they told us there were  
4 23 terabytes of material.

5 THE COURT: Have you looked through that material  
6 for privilege review?

7 MR. SCHAFHAUSER: We need a -- we have to hire an e-  
8 discovery company for that because there's so much --

9 THE COURT: Have you done that?

10 MR. SCHAFHAUSER: We got two proposals last night.  
11 We've been working on that, Judge, for quite some time.

12 THE COURT: Wait. This has been -- it's been a  
13 year, almost a year, since this order was issued. You haven't  
14 looked through these materials yet?

15 MR. SCHAFHAUSER: None of the materials have been  
16 reviewed by any --

17 THE COURT: Well, then, get it done in the next  
18 three weeks.

19 MR. SCHAFHAUSER: Your Honor, we're going to need  
20 more time than that.

21 THE COURT: Well, you're going to have to hire some  
22 more staff to do it. You've had a year.

23 MR. SCHAFHAUSER: We didn't look through it during  
24 the time period --

25 THE COURT: I don't know why.

1 MR. SCHAFHAUSER: -- the judge's decision was  
2 pending, Your Honor.

3 THE COURT: Okay. Well, you're going to be busy.

4 MR. SCHAFHAUSER: I understand that. But it's not  
5 just the attorneys who have to look through. It's the e-  
6 discovery company's --

7 THE COURT: I understand. You've got -- it's a  
8 tremendous amount to do. If you had been doing it over the  
9 course of the year, you'd be well positioned to have it done  
10 in three weeks.

11 MR. GRANTZ: Your Honor, may I just be heard on that  
12 subject?

13 The reason -- and Your Honor, obviously, I was  
14 asking the question what we did we do? The reason we didn't  
15 do it was because Judge Amon specifically stayed that  
16 privilege obligation.

17 On November 7th of last year, Mr. Nelkin made an  
18 application that we be required to conduct the privilege  
19 review and Judge Amon said that need not be done during the  
20 pendency of that -- of the appeal.

21 THE COURT: When was the order resolved? When was  
22 the order issued rather?

23 MR. SCHAFHAUSER: August, Your Honor.

24 THE COURT: August. We're in September.

25 MR. SCHAFHAUSER: And we immediately started this

1 process at that point. It took several --

2 THE COURT: You want four weeks? You can have four  
3 weeks. We are not -- this is what we're not doing. We're not  
4 waiting six weeks for you to get started looking at things.

5 MR. GRANTZ: We intend to get started immediately,  
6 Your Honor.

7 THE COURT: Good. So in four weeks --

8 MR. FINKEL: More than four weeks. I'm a single  
9 practitioner, Your Honor.

10 THE COURT: And you've got how many people at that  
11 table? You know --

12 MR. FINKEL: They can't -- they can't make rulings  
13 and decisions.

14 THE COURT: They can't make rulings. But, Mr. --

15 MR. FINKEL: Most respectfully, Your Honor, they  
16 can't decide whether certain aspects of my emails or  
17 conversations with my three clients are privileged. I can  
18 decide that.

19 In addition to that problem, the reality is the next  
20 two weeks, actually the next three weeks, are filled with  
21 Jewish holy days so we don't have a full two weeks. Beginning  
22 tomorrow at one o'clock, my week stops.

23 I will not work past 1:00 because I have to go home  
24 and make the (indiscernible) with my wife and then go to shul  
25 tomorrow night. Have dinner with the family and go to shul

1 tomorrow night. Thursday and Friday I'm out of commission  
2 totally. The following Friday, the same thing because Friday  
3 night is Kolydra (ph) is Yom Kippur.

4 THE COURT: I have some familiarity, sir. Please.  
5 Don't feel that you need to lecture me on --

6 MR. FINKEL: I'm not lecturing you.

7 THE COURT: Excuse me.

8 MR. FINKEL: I'm trying to give you the values that  
9 I face.

10 THE COURT: Feel free. Feel free to skip the  
11 lecture on what dates are in the Jewish calendar. I'm  
12 familiar with it. You may not have known that. I understand.  
13 I'm telling you now you don't have to tell me day by day  
14 what's in the Jewish calendar.

15 MR. FINKEL: I apologize. But that's my problem.

16 THE COURT: It is a problem.

17 MR. FINKEL: (Indiscernible)

18 THE COURT: Good. Okay.

19 Yes, Mr. Nelkin, you wanted to say something.

20 MR. NELKIN: No. I was just going to point out,  
21 Your Honor, that while they've been focusing on the imaging,  
22 they've had the computers.

23 Judge Amon had all the computers returned to them  
24 and so they've had full access to the computers and the images  
25 since this time. And they also I think would know what was in

1       their emails.

2               THE COURT: All right.

3               Folks, in deference to the holidays ahead -- not in  
4       deference to your role as a sole practitioner, Mr. Finkel,  
5       because there are certainly things that you have to do on your  
6       own -- but there's a great deal of work that is in common to  
7       all of you.

8               And one thing that has become clear throughout this  
9       litigation is that the fine distinctions between corporate  
10      entities and the individuals that work for different corporate  
11      entities have not been respected. You join in each other's  
12      motions quite understandably. There's a lot that you can do  
13      in common. Yes, there are certain decisions that you have to  
14      make each for your own clients. I get that. Six weeks.

15              MR. FINKEL: Thank you very much, Your Honor.

16              UNIDENTIFIED: Thank you, Your Honor.

17              THE COURT: All right. So in six weeks, you'll  
18      advise them of the privilege review. Then you'll have what,  
19      two weeks, three weeks for Stroz to review it?

20              MR. NELKIN: Your Honor, I think that they may  
21      require -- I think you said a month for them to do it just  
22      because -- and there are going to be new computers that  
23      they're going to have.

24              THE COURT: A month. Okay? So that gets us ten  
25      weeks out. And then -- sit down -- and then the next step

1 will be to submit additional evidence that you want to -- or  
2 present evidence at a hearing. Yes?

3 MR. NELKIN: I think what Your Honor had specified  
4 before was -- I mean, we can do it however Your Honor wishes,  
5 but --

6 THE COURT: If I've forgotten something I said  
7 before, everybody feel free to remind me. I don't pretend to  
8 remember everything I've done in this case. And I'm sure --

9 MR. NELKIN: It was October --

10 THE COURT: -- we've all forgotten. Yes.

11 MR. SCHAFHAUSER: The last time when we were here,  
12 Your Honor set a schedule to complete the privilege review,  
13 provide the information to Stroz so they could extract the  
14 material --

15 THE COURT: All right. Okay.

16 MR. SCHAFHAUSER: -- then have Stroz go through the  
17 machines, prepare a report. And then after that report, K-2  
18 was going to respond with a rebuttal report.

19 THE COURT: Okay.

20 MR. SCHAFHAUSER: And then you were going to set a  
21 rebuttal for Mr. Nelkin to submit at a hearing thereafter.

22 THE COURT: Okay. Let me find the order.

23 MR. NELKIN: At that point, you had actually said  
24 three weeks for the privilege review I think.

25 THE COURT: No.

1 MR. GRANTZ: It's October 13th.

2 THE COURT: Okay. Hold on a second, please.

3 MR. GRANTZ: I think 308.

4 THE COURT: 308?

5 MR. GRANTZ: Yeah.

6 THE COURT: Well, we're already off that schedule  
7 now because we've been caused for -- I'm sorry. Forgive me.  
8 I'm sure I've offended all of you by saying it was a year when  
9 it was only 11 months. Forgive me.

10 So, yeah, I had three weeks. We had parties who  
11 will not comply with that so I'll make it six weeks. I'll  
12 adopt the -- all the deadlines in there are adapted to where  
13 we are now.

14 So since we will have Friday as the equivalent of  
15 November 3rd in document number 308, I guess that gets us into  
16 February for a hearing. All right.

17 I'll put -- I'll just enter an order plugging these  
18 same dates, these same intervals. And let's look for some  
19 dates. We're going to need a hearing in February.

20 Yes?

21 MR. NELKIN: I just -- I don't know when the date  
22 for the plaintiff's initial thing is, but we have our -- they  
23 have an interlocutory appeal in our Fifth Circuit. Our Second  
24 Circuit brief is due on the 26th.

25 THE COURT: Yes.

1 MR. NELKIN: We just --

2 THE COURT: Whatever. Look --

3 MR. SCHAFHAUSER: That's not going to be impacted  
4 because we're going to have six weeks to do privilege and  
5 that's going to pass that date.

6 THE COURT: Yeah. Okay.

7 MR. NELKIN: Okay. All right. Fine.

8 THE COURT: Let's not worry about that. Okay.  
9 Yeah.

10 That was -- that was going to be my next question.  
11 We're going to hear some additional, you know, expert  
12 testimony on both sides about computers.

13 And then you guys have your case to present. How  
14 long do you anticipate?

15 MR. SCHAFHAUSER: Yes, Your Honor.

16 THE COURT: Hold on. Let him speak.

17 MR. SCHAFHAUSER: Within the schedule that Your  
18 Honor has outlined, I believe Your Honor only wants expert  
19 testimony and, therefore, we would submit our expert.

20 THE COURT: Yes. But what I'm hoping is we can  
21 proceed from there to complete the record.

22 MR. SCHAFHAUSER: Very well.

23 THE COURT: I'm hoping to do other things in my  
24 career than -- as enjoyable as it is spending time with you,  
25 I'm hoping to do other things in my career than this case. So

1 let's get this done.

2 MR. SCHAFHAUSER: Understood.

3 THE COURT: What do you want to do? A lot of your  
4 evidence I know has come in through the plaintiff's case, but  
5 have you folks all considered what you want to present?

6 MR. SCHAFHAUSER: Well, if given the opportunity, we  
7 would likely recall Mr. Friedman. You heard his testimony.  
8 We would recall him.

9 THE COURT: I did.

10 MR. SCHAFHAUSER: We would perhaps also call  
11 plaintiff who we had --

12 THE COURT: All right. So do you have a time  
13 estimate?

14 MR. SCHAFHAUSER: I'm thinking a couple of days.

15 THE COURT: Okay. Anyone else, Mr. Grantz?

16 MR. GRANTZ: I'm going to need to call Jack Ahern  
17 and Larry Ahern. And I'm probably going to want to recall Ben  
18 (inaudible) for a limited purpose.

19 THE COURT: Okay. Anyone else?

20 MR. GRANTZ: And possibly Philip Sandburg.

21 THE COURT: Who?

22 MR. GRANTZ: He's a partner in some of the -- at  
23 least one of the companies that --

24 THE COURT: Okay. Five witnesses.

25 MR. FELDMAN: Mr. Devine for maybe an hour.

1 THE COURT: Six. Yeah. Okay.

2 MR. RUDERMAN: Your Honor, if necessary, Mr.  
3 Birnbaum would be called. But if I may just address a matter,  
4 a preliminary matter, if you will, concerning this issue?

5 As the Court is aware, back in March, this court,  
6 excuse me, Judge Amon granted the motion to stay the action  
7 and compel arbitration concerning three out of the five  
8 defendants that I represent.

9 THE COURT: Yeah.

10 MR. RUDERMAN: And that arbitration --

11 THE COURT: All right. So you don't have to  
12 participate in the hearing, but your clients will be available  
13 as witnesses.

14 MR. RUDERMAN: If necessary, my clients might be  
15 available as witnesses, Your Honor.

16 THE COURT: Okay. But, yes. So you don't need to  
17 call anybody because as stated as to your clients in terms of  
18 the litigation against your clients, their --

19 MR. RUDERMAN: The action --

20 THE COURT: -- their availability to provide  
21 evidence or, you know, respond as basically a non-party  
22 discovery source that continues.

23 MR. RUDERMAN: If my clients are subpoenaed,  
24 obviously, Your Honor, they're subject to whatever subpoena  
25 powers --

1 THE COURT: Okay. So you don't need to participate  
2 in the hearing.

3 MR. RUDERMAN: And, Your Honor, two of the -- two of  
4 my clients, the motion was not granted as to them. There was  
5 a re-argument, a reconsideration motion and Judge Amon stayed  
6 the action as to them as well pending that reconsideration.

7 THE COURT: All right.

8 MR. RUDERMAN: So I would ask that it would apply to  
9 all five of my clients, Your Honor.

10 THE COURT: Well, if -- the ones as to whom it is  
11 currently stayed won't participate. And when the hearing  
12 comes around, if that remains the case, you'll stay on the  
13 sidelines. If you're back in the case, you'll participate.

14 MR. RUDERMAN: Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. BERGSON: No witnesses for the Hersko  
17 defendants, Your Honor.

18 THE COURT: All right. And Mr. Finkel?

19 MR. FINKEL: I may wish to call one or more of mine.

20 THE COURT: Okay. So it sounds like what, four  
21 days, five days total?

22 MR. SCHAFHAUSER: I think that sounds right, Your  
23 Honor.

24 THE COURT: Okay. Yes, Mr. Nelkin.

25 MR. NELKIN: Two points, Your Honor.

1           One is Your Honor obviously can set whatever he  
2           wants, but I believe at the last session, Your Honor basically  
3           indicated that it was just going to be limited to the reports  
4           and the cross-examination of the --

5           THE COURT: But then we're still going to have  
6           potentially, unless, you know, something happens to obviate  
7           the need for it, you're still going to want to continue with  
8           your motion for sanctions. No?

9           MR. NELKIN: Yes. I --

10          THE COURT: So you do not want me to develop the  
11          record?

12          MR. NELKIN: No. No.

13          THE COURT: Okay.

14          MR. NELKIN: We do. I just -- I thought that you  
15          had set a procedure before that -- I'm happy to go however you  
16          want, Your Honor.

17          The only other point I would say is with respect to  
18          Mr. Birnbaum and his companies, I believe that Judge Amon's  
19          last order on August 15th gave you discretion as to how to  
20          include or not include them.

21          THE COURT: Yeah.

22          MR. NELKIN: All of them.

23          THE COURT: Right. But I can't -- look, what I  
24          don't have discretion to do is contradict the order staying  
25          the case.

1 MR. NELKIN: No. But --

2 THE COURT: As non-party -- as a non-party source of  
3 discovery, it's certainly available, but you're not proceeding  
4 on your claims against them while the case is stayed against  
5 them.

6 MR. NELKIN: No. But I think with respect to  
7 sanctions, she left it open as to whether they would be  
8 included up to your discretion.

9 THE COURT: I see. For violating the preliminary  
10 injunction?

11 MR. NELKIN: Yeah.

12 THE COURT: Yeah. If they don't want to  
13 participate, they won't. That doesn't mean they can't be  
14 sanctioned for past conduct.

15 MR. NELKIN: That's all I wanted.

16 THE COURT: Yeah. Okay.

17 MR. RUDERMAN: Your Honor, let me just speak to that  
18 for a moment.

19 THE COURT: Yeah.

20 MR. RUDERMAN: I'm just -- I was looking back there.  
21 Again, Your Honor, I was newer to the case.

22 THE COURT: Hey, can I ask you a question?

23 MR. RUDERMAN: Certainly.

24 THE COURT: Does preliminary injunction remain in  
25 force against your clients?

1 MR. RUDERMAN: Was it in force?

2 THE COURT: Does it remain in force against your  
3 clients?

4 MR. RUDERMAN: Does it remain in force against my  
5 clients?

6 THE COURT: Can they violate the terms of the  
7 preliminary injunction today?

8 MR. RUDERMAN: Well, the preliminary injunction is  
9 until the action is resolved, Your Honor. That's the  
10 preliminary injunction.

11 THE COURT: So if they did something today that was  
12 clearly in violation of the preliminary injunction, they could  
13 be sanctioned, correct?

14 MR. RUDERMAN: The action has been stayed, Your  
15 Honor, so I guess it is still continuing and, therefore, the  
16 preliminary injunction is still in place.

17 THE COURT: Right. And they'd be committing  
18 contempt of court if they violated the terms of an injunction  
19 that remains in place, right?

20 MR. RUDERMAN: Yes, Your Honor.

21 THE COURT: So like I said, you don't have to  
22 participate. It doesn't mean the sanctions motion isn't  
23 pending. But you can do what you want.

24 MR. RUDERMAN: Well, Your Honor, I just -- then I'd  
25 like a little clarity if you will with regard to what the

1 Court's intention is. Will the Court be hearing the sanctions  
2 application against my client?

3 THE COURT: I've been hearing. Look, it continues.  
4 The motion remains pending.

5 MR. RUDERMAN: The motion was made, Your Honor.  
6 There are actually two motions or one -- one is a spoliation  
7 motion, Your Honor. And I would submit that even --

8 THE COURT: I'm taking it a non-party source of  
9 discovery can spoliates evidence and be sanctioned, yes?

10 MR. RUDERMAN: Your Honor, spoliation -- there is an  
11 arbitration, Your Honor, which should hear -- an arbitrator  
12 should hear any spoliation issues.

13 THE COURT: Mr. Ruderman, one thing I'm sure you'll  
14 find -- and maybe you'll learn from your colleagues -- if I  
15 ask a question, that's the question I'd like answered.

16 MR. RUDERMAN: Can a non-party spoil evidence, Your  
17 Honor?

18 THE COURT: Yeah. And be sanctioned for doing so?

19 MR. RUDERMAN: And be sanctioned for doing so? As a  
20 sanction, Your Honor, unrelated to the merits of the case,  
21 Your Honor. In other words --

22 THE COURT: I don't think they care if it's related  
23 to the sanctions of the case or not, but there could be  
24 sanctions imposed, yes?

25 MR. RUDERMAN: Yes, Your Honor. And I just want --

1 THE COURT: Let's complete the hearing on that.

2 MR. RUDERMAN: I just need -- I just need to  
3 understand whether this court -- will the spoliation sanctions  
4 that the plaintiff is seeking are, for example, a default  
5 judgment, et cetera, and so forth, withdrawing the answer.

6 And since my client is now subject to arbitration  
7 and an arbitrator will hear and will actually address the  
8 spoliation issue --

9 THE COURT: Well, look, if it gets to that point,  
10 I'm sure we will talk about what the appropriate sanction is.

11 But whether a sanction -- whether a sanctionable  
12 violation of the preliminary injunction has occurred, that  
13 remains on the table.

14 MR. RUDERMAN: Yes, sir, Your Honor.

15 THE COURT: Okay. Good. All right. So, look,  
16 let's do this.

17 Let's find -- anyone think it's going to be more  
18 than a week for the experts? I'm really hoping not. I'm sure  
19 you are all as well.

20 MR. SCHAFHAUSER: A week? Excuse me. A week to  
21 present the expert testimony by itself?

22 THE COURT: Yeah. For everybody to examine the  
23 experts on both sides. I can't --

24 MR. SCHAFHAUSER: I don't think it would take longer  
25 than that for sure.

1 THE COURT: What do you all think?

2 MR. NELKIN: We wouldn't disagree with that.

3 THE COURT: What do you think? What do you

4 anticipate? I know there's some guesswork involved.

5 MR. SCHAFHAUSER: Your Honor had actually set up a

6 schedule. You said that the expert reports were going to be

7 the direct testimony.

8 THE COURT: Yeah. Right.

9 UNIDENTIFIED: You said we're going to start with --

10 THE COURT: Right. With cross-examination.

11 UNIDENTIFIED: -- cross-examination.

12 THE COURT: A day?

13 UNIDENTIFIED: Two or three days.

14 THE COURT: Okay. So let's find -- let's do this.

15 Let's find a week where we can get two or three days

16 worth of testimony on the experts. Have a break. We can

17 assess that and then come back with the remaining witnesses on

18 the hearing.

19 It may be that in the interim we'll all agree it's

20 not useful, but I just want to have this ready to go because,

21 you know, how old is this case?

22 It's coming up on its second birthday and we've

23 barely scratched the surface of where we need to go to resolve

24 the case on the merits. We need to get moving.

25 UNIDENTIFIED: You want us to meet and confer and

1 get dates for you right now?

2 THE COURT: Let's look at the calendar. First of  
3 all, let me tell you when I'm available.

4 When do I have like two weeks with a week or two in  
5 between. Okay. So let's do the week of the 12th for the  
6 experts.

7 UNIDENTIFIED: February 12th?

8 THE COURT: Yeah. And then two weeks later for  
9 remaining witnesses. Not the following week. I want to have  
10 a break in between in the event that we need to pause or  
11 change course. I don't know. The 12th? Purim, is that going  
12 to interfere with anybody's ability to come to court? I  
13 didn't think so, but -- it won't -- I'll be here on Purim.  
14 March 1st is Purim.

15 MR. NELKIN: I thought you were setting it for the  
16 week of the 12th you said.

17 THE COURT: Yes. I'm looking ahead to the second  
18 week of it.

19 UNIDENTIFIED: You want to start the second part on  
20 a Thursday?

21 THE COURT: Is that Thursday? 12th?

22 UNIDENTIFIED: Does that make sense?

23 UNIDENTIFIED: February 26th is the Monday.

24 THE COURT: February 26th would be the Monday. And  
25 then the Friday is March 1st or --

1 UNIDENTIFIED: Thursday.

2 THE COURT: -- Thursday. Is that going to interfere  
3 with anybody's ability to be in court?

4 MR. NELKIN: It's got a fast day and --

5 THE COURT: It's a fast day. Okay. I'll be here,  
6 but I'm not as observant as many. So, all right. We'll start  
7 it that Monday and we'll be off the Thursday.

8 UNIDENTIFIED: February 12th? I'm sorry, I missed  
9 that.

10 UNIDENTIFIED: February 26th.

11 THE COURT: I'm sorry. February 12th for the expert  
12 week. The following week off. The following week thereafter,  
13 that's the week of the 26th, resuming with non-expert  
14 witnesses. We'll be off on the 1st.

15 MR. NELKIN: Well, Your Honor, the 28th is the fast  
16 day.

17 THE COURT: Okay.

18 MR. NELKIN: And the 1st the -- is Purim. And Purim  
19 actually technically one of the big readings is the night of  
20 the --

21 THE COURT: Let's look to the following week,  
22 please. So weeks of -- block off the weeks of February 12th  
23 and March 5th. All right.

24 We'll need a briefing schedule on the motions for  
25 what I'm going to call the attachment and other relief.

1 UNIDENTIFIED: Your Honor, before we get to that,  
2 can we just get the dates that the expert reports are due?

3 THE COURT: I'm going to have that in the order.  
4 I'm just going to take --

5 UNIDENTIFIED: Okay.

6 THE COURT: -- the dates that were in the October  
7 13th order and extend them out. I'll have them in an order  
8 later today.

9 UNIDENTIFIED: Fine, Your Honor. Sorry to  
10 interrupt.

11 THE COURT: That's fine. Okay. Give me a moment  
12 here. On the motion for attachment and other relief, let me  
13 hear exactly what you want to accomplish, Mr. Nelkin.

14 MR. NELKIN: Your Honor, would you like me to speak  
15 at all to whether we think you have the power or not to do it,  
16 because I believe --

17 THE COURT: As between magistrate judge and district  
18 judge?

19 MR. NELKIN: Yeah.

20 THE COURT: No.

21 MR. NELKIN: Okay.

22 THE COURT: No.

23 MR. NELKIN: Okay.

24 THE COURT: Some of it is injunctive relief. It all  
25 should have been directed to Judge Amon in the first instance.

1 I'll take the first cut at it. What I can order, I will if  
2 it's warranted. What I can't, and think is warranted, I'll  
3 recommend.

4 MR. NELKIN: Okay. But we'll put something in our  
5 brief about that part.

6 THE COURT: Please don't. Look, it's --

7 MR. NELKIN: Okay. We just -- we think the case law  
8 is pretty clear that --

9 THE COURT: Does it matter which judge's name is on  
10 the order to you?

11 MR. NELKIN: No.

12 THE COURT: Then let's see what it is you think  
13 you're entitled to and if you're entitled to it. Come on,  
14 what is it you want?

15 MR. NELKIN: Our concern, Your Honor, is, is that,  
16 as you pointed out, this case has been delaying and taking a  
17 long time to progress.

18 And what we're seeing is, is as the defendants are  
19 receiving rulings that they perceive to be adverse, that  
20 they're transferring their assets and they're shutting down  
21 their companies and --

22 THE COURT: So why aren't you filing a separate  
23 action in the state court for fraudulent conveyance? You  
24 could do that, right?

25 MR. NELKIN: But I think this court has the power

1 and we thought we were here already to do that. I mean, I  
2 guess we could do something in state court, but I think we  
3 have defendants that are from different locations. We might  
4 get removed back anyway. But what we're trying to accomplish  
5 is we're trying to prevent having to litigate this case only  
6 to find that the assets have disappeared.

7 THE COURT: Well, as I read what was in -- to the  
8 extent that you guys were addressing the substance of it as  
9 opposed to the procedure -- and I think Mr. Schafhauser, your  
10 response in particular -- not that I didn't read the others,  
11 just that's the one that's on the top of my mind at the moment  
12 -- you said what they're complaining about wasn't fraudulent  
13 as to the plaintiff. But is there a factual dispute about  
14 these transfers of property?

15 MR. SCHAFHAUSER: I don't believe it was fraudulent.

16 THE COURT: Is there a factual dispute about the  
17 transfers of property? That A transferred X property to B for  
18 Y price?

19 MR. SCHAFHAUSER: I don't dispute the documents.  
20 I'm being careful in answering. I don't dispute the --

21 THE COURT: You are always careful.

22 MR. SCHAFHAUSER: I don't --

23 THE COURT: Responsive would be nice too.

24 MR. SCHAFHAUSER: I'm trying to answer. I don't  
25 dispute the documents that I've seen.

1 I haven't had a chance to do a full investigation of  
2 the circumstances that led up to these transactions. So I,  
3 you know, I don't dispute what --

4 THE COURT: Okay. But if there are -- and, guys,  
5 all of you, ladies and gentlemen, please feel free to weigh in  
6 separately -- but is there any dispute that regardless of the  
7 precise remedy being sought, if the -- if some or all of the  
8 defendants here are changing the ownership of assets to make  
9 them inaccessible to the plaintiff should there be a judgment  
10 in his favor, that that is something about which this court  
11 can take some action? Anybody disagree with that proposition?

12 MR. GRANTZ: You're asking whether or not you have  
13 the authority to rule on (inaudible).

14 THE COURT: Yeah. Well, no. It's not that --

15 MR. GRANTZ: Yeah. I was just going to --

16 THE COURT: I'm trying to say -- because, look,  
17 there have been a number of procedural objections. This isn't  
18 the right remedy. It's not the right judge. It's not the  
19 right time.

20 But there are a lot of very disturbing allegations  
21 being made. I've no idea if they're true and I'm having  
22 difficulty finding out from Mr. Schafhauser the extent to  
23 which the facts are in dispute.

24 But what I'm asking about is whether anybody  
25 disagrees with the basic proposition that there is some remedy

1 to be had if it's true that some or all of the defendants are  
2 squirreling away assets in a way to make them inaccessible to  
3 a prevailing plaintiff.

4 MR. GRANTZ: Subject to the understanding that we  
5 think that the application is premature, yes.

6 THE COURT: Yeah. I get that. Okay.

7 MR. GRANTZ: But the issue that you asked Mr.  
8 Schafhauser about is, is there apt dispute about transfers --

9 THE COURT: Yeah.

10 MR. GRANTZ: -- and I don't think there is a fact  
11 dispute about the fact that properties were transferred. They  
12 were bona fide transfers to unrelated parties.

13 THE COURT: I get that. Okay. So --

14 MR. GRANTZ: That was what you asked him.

15 THE COURT: That was. And I wasn't getting a clear  
16 answer of whether it's in dispute.

17 MR. GRANTZ: Right.

18 THE COURT: Thank you, Mr. Grantz. I appreciate it.

19 So look, what I think we need to do is there are  
20 clearly disputes about whether a particular -- one particular  
21 remedy being sought or another is available. I get that. You  
22 should be able to fight about it. But I don't think it's a  
23 waste of time for us.

24 In the absence of any disagreement that doing the  
25 thing that the plaintiff basically alleges, trying to hide

1 assets that should be available to cover a judgment so that a  
2 judgment cannot be paid is something that the Court can take  
3 action to prevent.

4 If that's generally not in dispute, I think we  
5 should get to litigation of what's -- what facts are agreed  
6 upon, resolve those that are disputed, and to the extent that  
7 they show a basis for some remedy, just litigate what the  
8 appropriate remedy is.

9 MR. GRANTZ: I'm not sure that we're prepared to  
10 agree with Your Honor as to that first point. And certainly  
11 to the extent that we don't agree, we want to take the  
12 opportunity to object to it in our papers.

13 THE COURT: Yeah. Of course. Yeah.

14 MR. GRANTZ: To the extent that Your Honor concludes  
15 that you do have that authority --

16 THE COURT: When you say me as opposed to Judge Amon  
17 or the Court?

18 MR. GRANTZ: The Court.

19 THE COURT: Okay.

20 MR. GRANTZ: I'm talking about the Court. I presume  
21 that if Your Honor thinks you don't have the right to deal  
22 with the injunctive issue, you'll talk to -- send it up and --

23 THE COURT: Okay.

24 MR. GRANTZ: Yeah.

25 THE COURT: I just wasn't sure what distinction you

1 had brought.

2 MR. GRANTZ: No. That's the distinction I'm making,  
3 which is we will object to it.

4 THE COURT: Yeah.

5 MR. GRANTZ: And if Your Honor or Judge Amon  
6 believes that you have the authority, then we'll deal with the  
7 next issue which is we clearly have fact disputes all  
8 throughout the status report, not to mention the fact that the  
9 status report is not an affidavit. And there are documents  
10 coming from --

11 THE COURT: I'm not taking the -- I'm not taking it  
12 as an affidavit.

13 MR. GRANTZ: Right.

14 THE COURT: Look, I essentially view it as a  
15 procedurally, improvident, pre-motion conference letter.

16 MR. GRANTZ: Okay.

17 THE COURT: Okay? That's all.

18 MR. GRANTZ: That's fine. So addressing those  
19 issues --

20 THE COURT: Yeah.

21 MR. GRANTZ: -- we think that the allegations that  
22 are being brought forth to Your Honor are -- we have to go  
23 through them with our clients.

24 Obviously, we haven't done that. We got this  
25 request in what a week and it's filled with information that's

1 not within our knowledge. So if we go through that with our  
2 clients, we have to investigate these transactions. We have  
3 to understand what happened so that we can be in a position to  
4 respond on the factual basis, not just on the legal basis.

5 THE COURT: Okay. So why don't you give me a notice  
6 of motion and a brief in 30 days.

7 And you guys will respond in 30 days. Okay? Single  
8 brief, please, unless there's something -- what we're not  
9 going to do is what was -- what's been done in the past where  
10 you've inundated the Court with just hundreds and hundreds of  
11 pages of briefing on an issue.

12 MR. GRANTZ: I'm fine with that, Your Honor. Sorry  
13 to interrupt you.

14 THE COURT: Single brief. If you want to have a  
15 slight page extension, talk to each other about that. I'm  
16 happy to have a proposal from you all. We'll work that out.  
17 It's not going to be multiple briefs on the same issue.

18 MR. GRANTZ: (Inaudible). I mean, we have a lot of  
19 concerns.

20 THE COURT: Affidavits. Look, that's the proof you  
21 bring to bear on it.

22 MR. GRANTZ: Okay.

23 THE COURT: But, you know, just a unified set of  
24 briefing on each side to tee up the issue. All right. So 30  
25 days and 30 days. And you guys can talk to each other about

1 the length of brief and see if you can come to an agreement?

2 MR. SCHAFHAUSER: Yes, Your Honor.

3 THE COURT: Okay. Anything else that we need to  
4 plan for today, Mr. Schafhauser?

5 MR. SCHAFHAUSER: There is one thing that counsel  
6 and we discussed before the hearing and that is that we  
7 discussed -- if Your Honor were amenable to it, I think both  
8 sides would be amenable to having a settlement conference.

9 THE COURT: My goodness.

10 MR. SCHAFHAUSER: We concur with Your Honor's  
11 sentiment that this litigation has already gone on pretty  
12 long. So if Your Honor were amenable, we would --

13 THE COURT: I am amendable. Shame on me that I  
14 haven't been asking. Just given the nature of the litigation,  
15 I assumed any hope of settlement was out of reach. But, no,  
16 really shame on me for not pursuing it at every opportunity.  
17 I'm happy to pursue settlement.

18 MR. SCHAFHAUSER: I had asked counsel before the  
19 hearing started this morning. And when Your Honor came out on  
20 the bench, we were exchanging dates. But of course what dates  
21 were available doesn't really matter because it depends on  
22 your availability.

23 THE COURT: Okay. Well, I'll make myself available.  
24 Are you all in agreement that this is a useful exercise? You  
25 know. I'm always happy to have a settlement discussion, and I

1 don't want to throw cold water on it, but what I don't want to  
2 do is throw anything that we've been discussing as a schedule  
3 off for us to come into a room together and have everybody  
4 pump their chests off the record and then realize we're going  
5 nowhere.

6 Have you explored actual settlement terms that would  
7 be on the table?

8 MR. SCHAFHAUSER: We actually had a mediation with  
9 Judge Martin in -- I'm looking at counsel trying --

10 MR. GRANTZ: It was right around the time the case  
11 was filed.

12 MR. SCHAFHAUSER: In January 2016, we had a back and  
13 forth that day. And quite honestly, I'm trying to remember,  
14 Mr. Nelkin, whether we've had substantive communications since  
15 then.

16 Sporadically, Your Honor, I think we've had  
17 discussions frankly outside, but I can't remember offhand the  
18 last substantive discussion.

19 MR. NELKIN: I believe, and my memory could be  
20 faulty, but I believe that the only exchange where numbers  
21 were discussed was at the initial mediation at the very  
22 beginning of the case.

23 THE COURT: Well, look, there's a lot of water under  
24 the bridge. Let's leave it this way.

25 I am not just willing, I am eager to have you guys

1 settle this case and to help in any way I can with that.

2 What I would like you to do is talk among  
3 yourselves. If you get to the point where you're satisfied  
4 that this is a good use of our time -- because you've got a  
5 lot to do and I do not anticipate lightly changing the  
6 schedule we've been talking about today.

7 If you all agree this is a good use of our time,  
8 given all the other stuff that you've got to do, let me know  
9 and I will find a time to put you on the calendar.

10 MR. NELKIN: I mean, we had discussed doing it  
11 sooner rather than later.

12 THE COURT: Yeah.

13 MR. NELKIN: I don't know if that works with your  
14 schedule or not.

15 THE COURT: We'll make it work.

16 MR. SCHAFHAUSER: We had actually -- and again we're  
17 back at the holidays which complicates things, but we had  
18 discussed Monday as a possible date.

19 THE COURT: That soon may be difficult.

20 MR. SCHAFHAUSER: Okay.

21 THE COURT: It probably is. Let me just take a  
22 look. Let me just take a look at what I've got here.

23 MR. NELKIN: Tuesday we're before Judge Amon in the  
24 afternoon.

25 THE COURT: Tuesday the 26th?

1 MR. NELKIN: Yeah.

2 THE COURT: Oh. For some reason I was talking to  
3 her and I thought she -- I think she was telling me it was  
4 Thursday. But you're sure it's Tuesday of next week?

5 MR. NELKIN: Yeah.

6 UNIDENTIFIED: Tuesday the 26th.

7 UNIDENTIFIED: Three o'clock.

8 UNIDENTIFIED: Three o'clock.

9 THE COURT: Three o'clock. Oh, boy. No. I'm  
10 hesitating only because I had hoped to be there just to get up  
11 to speed more quickly, but I've got something else that I  
12 can't skip in a different case.

13 I could -- oh, boy, I could do the afternoon with  
14 you on Monday.

15 MR. SCHAFHAUSER: The problem we have -- and I told  
16 this to Mr. Nelkin -- is my client is leaving for Israel out  
17 of JFK at 6:00 so we were hoping to start earlier.

18 THE COURT: Yeah.

19 MR. SCHAFHAUSER: But that's fine. We can perhaps  
20 confer on another date and get back to Your Honor or --

21 THE COURT: Well, let me see. I think we could move  
22 the stuff on Monday morning.

23 THE CLERK: Yes.

24 THE COURT: Okay. All right. Let me move some  
25 things around and we'll meet Monday morning. You going to

1 have principals here?

2 MR. SCHAFHAUSER: I would intend to bring, yes, my  
3 client.

4 MR. GRANTZ: I don't think I'll have Mr. Ahern here  
5 because of his condition.

6 THE COURT: Okay.

7 MR. GRANTZ: But I'll have him available by phone.

8 THE COURT: Okay. Look, what I want is to just make  
9 this a good use of our time especially now I'm going to be  
10 moving some things around to accommodate you.

11 My standard rule is principals in the court or on  
12 the phone, whichever in your judgment you think is most useful  
13 to making progress. As long as progress can be made, that's  
14 fine.

15 Can you get me something by Thursday with your  
16 respective statements to settlement position? I want to be up  
17 to speed.

18 MR. NELKIN: We're out of pocket --

19 THE COURT: Oh, right, of course, yeah. All right.  
20 Look, I'm going to -- somewhat against my better judgment,  
21 I'll do this on spec, you know, going into it without getting  
22 anything in advance.

23 MR. SCHAFHAUSER: The other alternative, and I,  
24 again, I don't mean to speak this way, I'm addressing the  
25 Court --

1 THE COURT: Yeah.

2 MR. SCHAFHAUSER: -- but it really depends on Mr.  
3 Nelkin's preference too. The other alternative is we could  
4 pick another date which allows us both to put in our  
5 submissions.

6 THE COURT: Talk to each other. Let's set aside  
7 Monday to do this.

8 If you among yourselves think that -- whether  
9 because of your respective positions or because I won't be up  
10 to speed enough, you prefer to do it another date, contact  
11 chambers and work something out. It's fine with me.

12 The one thing I'll say, particularly if we're going  
13 ahead on Monday morning and I don't have your settlement  
14 statements in, I really don't want to spend the time with each  
15 of you explaining why you're right. I want to get down to  
16 what you're prepared to do to end the case.

17 If early on, on both sides you're digging in and  
18 we're not making progress, that's fine. I'm not going -- I  
19 promise you I'm not going to twist anybody's arm to settle the  
20 case.

21 But if it looks like we're not making progress, I'll  
22 call a halt to it pretty quickly. So, the burden's going to  
23 be on the parties to let me know that you're serious about  
24 getting to a settlement. Okay?

25 MR. SCHAFHAUSER: Understood.

1 THE COURT: Okay.

2 MR. SCHAFHAUSER: Your Honor, may I ask this? Could  
3 I have the opportunity to consult --

4 THE COURT: You need a few minutes?

5 MR. SCHAFHAUSER: After discussing this with Mr.  
6 Nelkin, perhaps we can --

7 THE COURT: You just want a few minutes before we  
8 wrap up for the day?

9 MR. SCHAFHAUSER: Right. Right. I just want --

10 THE COURT: Okay.

11 MR. SCHAFHAUSER: -- I want to talk schedule with  
12 him.

13 THE COURT: Take a break. Let's come back in five  
14 minutes. Okay?

15 MR. SCHAFHAUSER: Thank you. Thank you.

16 (Recess from 11:28 a.m. to 11:40 a.m.)

17 MR. NELKIN: Yeah. We can do that.

18 MR. GRANTZ: Your Honor, before we get to the  
19 settlement issue --

20 THE COURT: Okay. We're back on the record again.

21 MR. GRANTZ: Sorry.

22 THE COURT: Go ahead.

23 MR. GRANTZ: We both have issues with the production  
24 of the computers by Friday. And mutually we will produce them  
25 by next Wednesday.

1 THE COURT: Okay.

2 MR. GRANTZ: (Inaudible).

3 THE COURT: Okay. So that's -- I'm sorry. Today  
4 is the -- next Wednesday will --

5 MR. GRANTZ: Next Wednesday is the 27th.

6 THE COURT: 27th. Thank you. Okay.

7 MR. SCHAFHAUSER: Thank you, Your Honor.

8 MR. NELKIN: And I assume that you will have yours  
9 delivered to Stroz too.

10 MR. SCHAFHAUSER: We're going to have it delivered.  
11 Of course we're going to comply with it.

12 THE COURT: Okay. All right.

13 MR. NELKIN: Yeah. Thank you.

14 THE COURT: For Monday, are we on? Do you want to  
15 do something else? What do you have in mind?

16 MR. NELKIN: The plaintiff is prepared to come in  
17 on Monday and I believe it will be a worthwhile exercise.  
18 I'm not sure where the defendants are right now.

19 MR. SCHAFHAUSER: We have a concern that while it  
20 might be a worthwhile exercise, (inaudible). So what we've  
21 asked for is a demand because (inaudible) so that we can come  
22 in and deal with it.

23 But we haven't gotten --

24 THE COURT: Okay. Perfectly reasonable. Look,  
25 guys, I mean it. I will do what I can to promote settlement.

1 I don't think it's useful until there's been a  
2 demand. Exchange a demand and offer. Do it promptly. All  
3 right. When you think that we are at the point where we can  
4 schedule something, I will do it. As you saw, I will move  
5 things around to accommodate you.

6 MR. NELKIN: Your Honor, I think because of  
7 scheduling that we would like to have it on Monday. And we  
8 will give them a demand by tomorrow.

9 THE COURT: You know, it's not that simple. If you  
10 -- there are a lot of parties on the other side.

11 They may have a lot of common interests and they  
12 may border the lines, but there are a lot of people who have  
13 to get to yes. It doesn't happen overnight.

14 And I don't know where you've been with the demand,  
15 but I'm not going to -- I'm not going to force anybody. If  
16 somebody says to me they're not ready to talk yet, I'm not  
17 going to make them talk.

18 MR. SCHAFHAUSER: The other --

19 THE COURT: So that said, talk to each other. If  
20 you get a demand out and you decide it's worthwhile going on  
21 Monday, I'll make it happen.

22 MR. SCHAFHAUSER: The other alternative we  
23 proposed, Your Honor, was any time -- subject of course to  
24 the Court's available, any time the week of October 15th or  
25 October 22nd, which is after the holidays for everyone.

1 THE COURT: Okay. Well, talk to each other.  
2 What's the magic of Monday?

3 MR. NELKIN: The magic of Monday is it's the first  
4 and pretty much only day that the parties can do it before  
5 the holidays and before we start having all of the hearings  
6 and all of the other matters.

7 So we thought that on the plaintiff's side that if  
8 there was a chance to resolve it before the parties had to do  
9 all the work and the Court had to do all the work, that it  
10 was worthwhile.

11 If that's going to be the case --

12 THE COURT: Look, Mr. Nelkin. It just surpasses  
13 belief that almost two years into the case your client  
14 doesn't know what he wants. Talk to them.

15 You think we can -- and look, guys, if you get a  
16 demand today and you think we can be in a position to take  
17 advantage of a settlement opportunity that we may not get  
18 before you expend a lot of resources, maybe you want to go  
19 forward on Monday. I am not going to force it.

20 In fact, if you're not all in agreement that we  
21 should go forward on Monday, we won't. But if this is an  
22 opportunity that's going to pass, I hope it won't.

23 MR. SCHAFHAUSER: Fair enough, Your Honor. We'll  
24 look for packages tomorrow on that. Thank you.

25 THE COURT: Okay. All right. Thank you, all.

1 ALL COUNSEL: Thank you.

2 THE COURT: Have a good day.

3 (Proceedings concluded at 11:45 a.m.)

4 I, CHRISTINE FIORE, court-approved transcriber and  
5 certified electronic reporter and transcriber, certify that  
6 the foregoing is a correct transcript from the official  
7 electronic sound recording of the proceedings in the above-  
8 entitled matter.

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11 \_\_\_\_\_ September 20, 2017

12 Christine Fiore, CERT  
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